

IT 99-8

Tax Type:

Income Tax

Issue:

Withholding Tax – Failure To File Return/Make Payment

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

“FALDEROL PUBLISHING”,

Taxpayer

No. 97-IT-0000
FEIN: 36-0000000

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Sean Cullinan for the Illinois Department of Revenue. Taxpayer appeared pro se.

Synopsis:

This matter comes on for review pursuant to taxpayer's timely protest of the Notice of Deficiency ("NOD") dated September 26, 19xx proposing an assessment of tax, penalty and interest for the fourth quarter of 1990. The Department maintains that the taxpayer withheld Illinois Income tax from the compensation paid to its employees but did not pay such monies over to the Department nor file a tax return as required under Section 704 and 705 of the Illinois Income Tax Act ("IITA"). Since the taxpayer failed to file a return, the Department estimated the liability based upon prior filings, however, the taxpayer contends that its liability is substantially less than the

amount stated on the NOD due to declining business operations and has submitted books and records to prove its contention. Following the submission of all evidence and a review of the record, it is my determination that the Notice of Deficiency should be finalized as revised by Taxpayer's Exhibit No. 1.

Findings of Fact:

1. The Department's *prima facie* case, was established by the NOD, dated September 26, 19xx showing a total liability due and owing in the amount of \$ 4,097.00 for the fourth quarter of 1990. Dept. Ex. No. 1.
2. "Falderol Publishing" produced the artwork for comic books. Tr. pp. 20, 21.
3. Due to financial difficulties, taxpayer filed for bankruptcy under Section 7 of the Bankruptcy Code on December xx, 19xx. Dept Group Ex. No. 2, p. 6.
4. The taxpayer did not pay the rent on its office lease for September of 19xx and was locked out of its office at the end of September. Tr. p. 12.
5. The taxpayer defaulted on the lease of its equipment and the lessor demanded payment on November 11, 1990. Tr. p. 30; Dept. Group Ex. No. 2, p. 93.
6. Four payroll checks were issued and cashed for services rendered during the fourth quarter of 1990. Taxpayer Ex. No. 1; Tr. pp. 11, 12. The four employees who received compensation were: "Athos Meershois, "Porthos Gascone", "Aramis Cidique" and "D'Artagnan Duvalier". Tr. pp. 11-12, 21-22, 31; Dept Group Ex. No. 2, pp. 11, 13-16, 46-48; Taxpayer Ex. No. 1.
7. Two individuals who worked and received compensation during the fourth quarter of 1990 filed unemployment claims with the Illinois Department of Employment Security.

Their unemployment claims indicated that their last day of work was 11/15/90. Tr. p. 18; Dept. Group Ex. No. 2, p. 10.

Conclusions of Law:

The Department issued the proposed assessment claiming that the taxpayer failed to file withholding tax returns and pay over the taxes deducted from its employees' wages to the State of Illinois as obligated to under Sections 704 and 705 of the IITA.

Section 705 provides in pertinent part:

Employer's Liability for Withheld Taxes

Every employer who deducts and withholds or is required to deduct and withhold tax under this Act is liable for such tax. For purposes of assessment and collection, any amount withheld or required to be withheld and paid over to the Department, and any penalties and interest with respect thereto, shall be considered the tax of the employer.

35 ILCS 5/705 (formerly Ill. Rev. Stat. 1991, ch. 120, §7-705).

The taxpayer did not file a tax return for the fourth quarter of 1990, therefore, the Department estimated the liability based upon prior filings. Taxpayer contends that its liability is substantially less than the amount stated on the NOD since it maintained a significantly smaller work force in the fourth quarter of 1990 than in previous quarters, due to declining business.

Pursuant to Illinois statute, the NOD is *prima facie* correct and is *prima facie* evidence of the correctness of the amount of tax due, as shown therein. 35 ILCS 5/904. In order to overcome this presumption of validity, the taxpayer "must produce competent evidence, identified with their books and records and showing that the Department's returns are incorrect." 35 ILCS 5/904. Oral testimony is not sufficient to overcome the *prima facie* correctness of the Department's

determinations. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1st Dist. 1988).

In the case at hand, the taxpayer produced credible evidence which included its payroll register, bank statements, copies of checks and vouchers and its bankruptcy petition which proved that due to financial difficulties, the taxpayer terminated the majority of its employees prior to the fourth quarter of 1990. Furthermore, the documents submitted establish that only four employee paychecks cleared the company's bank account, hence proving that the liability shown due on the NOD is incorrect.

Wherefore, for the reasons stated herein, it is my recommendation that the Notice of Deficiency be finalized as revised by Taxpayer's Exhibit No. 1.

Date: 3/31/99

Christine O'Donoghue
Administrative Law Judge